

1 Anthony Schoenberg (*pro hac vice*)
2 California Bar No. 203714
aschoenberg@fbm.com
3 David J. Lazerwitz (*pro hac vice*)
4 California Bar No. 221349
dlazerwitz@fbm.com
5 Emily M. Lieban (*pro hac vice*)
6 California Bar No. 303079
elieban@fbm.com
7 FARELLA BRAUN + MARTEL LLP
8 235 Montgomery Street, 17th Floor
9 San Francisco, California 94104
10 Telephone: (415) 954-4400
11 Facsimile: (415) 954-4480
12 Todd L. Bice
13 Nevada Bar No. 4534
14 tlb@pisanellibice.com
15 Robert A. Ryan
16 Nevada Bar No. 12084
17 rr@pisanellibice.com
18 PISANELLI BICE PLLC
19 400 South 7th Street, Suite 300
20 Las Vegas, Nevada 89101
21 Telephone: (702) 214-2100
22 Facsimile: (702) 214-2101
23 Attorneys for Nevada Links, Inc.
24

16 UNITED STATES DISTRICT COURT
17 DISTRICT OF NEVADA, NORTHERN DIVISION
18

19 UNITED STATES OF AMERICA,
20 Plaintiff,
21 vs.
22 COUNTY OF CLARK and NEVADA
23 LINKS, INC.,
24 Defendant.

Case No. 2:17-cv-02303-MMD-PAL
**DEFENDANT NEVADA LINKS, INC.'S
REPLY IN SUPPORT OF ITS MOTION
TO DISMISS**
(Hearing Requested)

The Hon. Miranda M. Du

1 **I. INTRODUCTION**

2 Plaintiff United States of America (“Plaintiff” or the “United States”) has failed to allege
 3 sufficient facts to support its convoluted claim for breach of fiduciary duty against Nevada Links,
 4 a private corporation with no legal relationship to the Plaintiff. In its Opposition (ECF 25),
 5 Plaintiff engages in a tortured reading of the relevant cases to try to create trust duties where none
 6 exist, and in the process seeks to create an entirely new common law theory of transferee liability
 7 out of whole cloth, unsupported by relevant legal authority. In fact, in the one case with
 8 analogous facts, *Begay*, the court granted a motion to dismiss where the defendant—like Nevada
 9 Links—was a business that had done nothing more than enter into an agreement for certain land
 10 rights that the plaintiffs claimed, after the fact, were known to the defendants to be priced below
 11 “fair market value.” This dispositive case alone warrants the granting of this motion.

12 Plaintiff also improperly proffers videotaped testimony from 2011, out of which Plaintiff
 13 cherry-picks selected phrases in an attempt to paint a misleading picture that Nevada Links
 14 allegedly had knowledge of the County’s purported breach of trust. Even assuming that the Court
 15 considers this improper extrinsic evidence, a review of the entire video demonstrates that Nevada
 16 Links did not have actual or constructive knowledge of the alleged breach of trust by the County at
 17 the relevant time.

18 Accordingly, Nevada Links’ motion to dismiss should be granted.

19 **II. ARGUMENT.**

20 **A. Plaintiff’s Tortured Reading Of The Relevant Case Law Cannot Save Its
 21 Claims Against Nevada Links Because Those Cases Confirm That Congress
 22 Did Not Intend to Create A Trust under SNPLMA.**

23 No party disputes that a trust may only exist where Congress, in enacting law,
 24 “manifest[ed] . . . an intent to create a fiduciary relationship.” *District 22 United Mine Workers of*
Am. v. Utah, 229 F.3d 982, 989 (10th Cir. 2000) (“*District 22*”) (citation omitted). However,
 25 absent an express declaration of trust, whether Congress has manifested that intent depends on
 26 whether “the relevant statutory provision contains ‘an enumeration of duties’ which would justify
 27 a conclusion that Congress has intended to create a trust relationship.” *Id.*

1 SNPLMA lacks any express language to indicate that the transferred lands would be held
 2 in trust. Moreover, it does not contain an enumeration of duties to support the conclusion that
 3 Congress intended to create a trust relationship. Like the enabling act at issue in *District 22*,
 4 SNPLMA establishes an honorary purpose—the “orderly disposal of certain Federal Lands in
 5 Clark County, Nevada” and “the acquisition of environmentally sensitive lands” within the State.
 6 *Id.* at 989; SNPLMA § 2(b). The first part of this purpose—and much of the SNPLMA—does not
 7 govern the actions of the County at all and, instead, governs the actions of the United States’
 8 Secretary of the Interior’s disposal of federal lands located within the County. *See* SNPLMA at
 9 §§4(a)-(f). Only subsection 4(g) concerns activity by the County, and it provides the County, as
 10 transferee, with broad discretion in the disposal of public lands. SNPLMA at § 4(g). Section 4(g)
 11 does not create any obligation on the part of the County to act once it accepts the transfer of land;
 12 the County was under no obligation to sell or lease the land and could instead hold the land unused
 13 in perpetuity with no monies received by the County and, thus, nothing transferred to the United
 14 States. This broad discretion prefaced only by the precatory language of the statute cannot be said
 15 to manifest an intent to create a trust. Accordingly, Plaintiff cannot state a claim based on the
 16 alleged creation of a trust. *See District 22*, 229 F.3d at 990 (no trust created by Utah Enabling Act
 17 because it did not “direct and restrict the legislature as to the manner in which it may dispose of
 18 the Lands and proceeds therefrom”).

19 Plaintiff strains to analogize Section 4(g) of the SNPLMA to the Colorado Enabling Act
 20 that was at issue in *Branson School District RE-82 v. Romer*, 161 F.3d 619 (10th Cir. 1998)
 21 (“*Branson*”). However, unlike the SNPLMA, the enabling act at issue in *Branson* not only
 22 transferred lands for the particular benefit of the public schools, it also prescribed the manner of
 23 disposal (“public sale”), a minimum per acre price (\$2.50), the manner in which funds were to be
 24 held (segregated permanent school fund), and the use of the interest from those funds. *Id.* at 634.
 25 Moreover, the relevant enabling act provision in *Branson* provided that the state “shall” dispose of
 26 the lands at issue, thereby removing all discretion from the state. *Id.* By contrast, Section 4(g)
 27 does not establish the manner of sale, a specific minimum price beyond that which the market will
 28 support, the manner in which the various recipients of the proceeds are required to hold the funds,

1 or the use of interest on those funds. In fact, the only requirements of Section 4(g) on the alleged
 2 trustee are to remit the funds from sale or lease, if any, of the lands to the various recipients and—
 3 should the County decide to dispose of the land—seek fair market value. SNPLMA at § 4(g)(4).
 4 These rote statutory duties are insufficient to support the establishment of a trust in lieu of
 5 ordinary statutory responsibilities. Other than *Branson* and its consideration of the readily
 6 distinguishable Colorado Enabling Act, Plaintiff has not cited to a single case in which the United
 7 States has been found to have conveyed land in trust to a state.

8 For these reasons, the court should reject Plaintiff’s attempt to extend narrowly crafted
 9 precedent governing the establishment of a trust and thereby transform what is otherwise a
 10 statutory responsibility into one governed by trust and fiduciary duty principles.

11 **B. Nevada Links Is Not Liable For The Actions Of The County.**

12 Even assuming that the Act created a trust obligation, Plaintiff has failed to plead sufficient
 13 facts to establish that the County breached the alleged trust. The County leased the property
 14 following a competitive bidding process in 1999. *See* Complaint (ECF 1) (“Compl.”) at ¶ 25. The
 15 Fourth Amendment was not written upon a blank slate but against the backdrop of established
 16 obligations under the 1999 Lease and subsequent amendments. Against that backdrop, Plaintiff
 17 has not pled—and cannot plead—any facts demonstrating that Nevada Links had actual or
 18 constructive knowledge of the County’s alleged breach.

19 **1. Plaintiff’s Mandatory Appraisal Theory Is Contrary To Law.**

20 Plaintiff asserts that the County was required to seek an appraisal in order to fulfill its
 21 alleged obligations as a trustee, and Plaintiff further asserts that Nevada Links knew of the
 22 existence of such a duty and of the County’s alleged breach of that duty. Plaintiff’s Opposition to
 23 Motion to Dismiss by Defendant Nevada Links, Inc. (ECF 25) (“Opp.”) at 12. This far-fetched
 24 theory is based on a fundamental misstatement of law. “A trustee’s duty of loyalty and of
 25 reasonable care dictates that it must seek to obtain the best price obtainable for trust property
 26 which it is selling.” *Murphy v. Central Bank & Tr. Co.*, 699 P.2d 13, 14 (1985). To that end, the
 27 trustee “should secure competitive bidding and surround the sale with such other factors as will
 28 tend to cause the property to sell to the greatest advantage.” *Id.* In arguing that the County has

1 failed in this duty, Plaintiff cites to cases where the trustee made no effort to ensure it received the
 2 highest price the market would support. In *National Parks and Conservation Association v. Board*
 3 *of State Lands*, 869 P.2d 909, 922 (Utah 1993), the trustee relied on an appraisal submitted by the
 4 buyer without fostering any competition or making an effort to independently determine the fair
 5 market value of the trust corpus. Similarly, in *Belcher v. Benjamin*, 348 F. Supp. 61, 156-58 (N.D.
 6 Ala. 1968), there was no advertisement of the public sale of the shares at issue and the trustee
 7 relied on an appraisal made 30 years prior to establish the reserve price. In both cases, the courts
 8 found that the trustees had breached their duty to seek the best price. *Nat'l Parks & Conserv.*
 9 Ass'n, 869 P.2d at 922; *Belcher*, 348 F Supp. at 158.

10 In contrast, here the County published a request for proposal and solicited bids from the
 11 public at large. RJD at Ex. 1. The bid made by Nevada Links was accepted by the County
 12 following that competitive bidding process. *Id.* Accordingly, even assuming a trust exists, the
 13 County fully complied with its obligations to secure competitive bidding consistent with the cases
 14 cited in Plaintiff's brief.

15 Moreover, Plaintiff states that a "trustee is under a duty to the beneficiary in administering
 16 the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing
 17 with his own property." Opp. at 11, citing Restatement (Second) of Trusts § 174. The County has
 18 done exactly that here. The Lease conveyed a total of 154 acres of land to Nevada Links, 63 acres
 19 of which belonged to the County independent of the land conveyed by Plaintiff under the
 20 SNPLMA. See Compl. at ¶ 25. The County has treated identically all 154 acres—including the
 21 91 acres of former federal property and the remaining 63 acres contributed by the County—by
 22 initiating a competitive bidding process in 1999 and leasing all of it to Nevada Links, the winning
 23 bidder. See Compl. at ¶ 25; RJD at Ex. 1. This refutes Plaintiff's theory that there was a breach of
 24 trust (assuming a trust existed in the first place), much less that Nevada Links had knowledge of it.

25 **2. Plaintiff Has Not Pled Facts Sufficient To Demonstrate That Nevada**
 26 **Links Had Actual Or Constructive Knowledge Of The County's**
Alleged Breach.

27 Plaintiff contends that as a participant in the County's alleged breach, Nevada Links is
 28 jointly and severally liable with the County. In the first instance, Plaintiff misstates the law

1 regarding transferee liability. In the second, Plaintiff has failed to allege in its complaint any facts
 2 supporting its conclusory and threadbare allegation that Nevada Links had either actual or
 3 constructive knowledge of the County's alleged breach. Plaintiff's claim against Nevada Links
 4 should therefore be dismissed. *See Fowler*, 578 F.3d at 210–11.

5 **a. Plaintiff Misstates And Attempts To Improperly Expand The**
 6 **Legal Standard For Transferee Liability.**

7 Plaintiff claims that there are two distinct bases for holding Nevada Links liable for the
 8 alleged breach of the County—as a transferee of the property and as a “knowing participant” in the
 9 alleged breach of trust. These theories, however, are one in the same.

10 In order to hold the transferee of a trust asset liable for a breach committed by a fiduciary,
 11 the beneficiary must demonstrate that the transferee “had actual or constructive knowledge of the
 12 circumstances that rendered the transaction unlawful.” *Harris Tr. and Sav. Bank v. Salomon*
 13 *Smith Barney, Inc.*, 530 U.S. 238, 251 (2000). Plaintiff attempts to create a separate basis for
 14 liability under *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1396 (D. Nev. 1984), arguing that
 15 Nevada Links was a “knowing participant” in the County’s alleged breach of trust. But in fact,
 16 *Donovan* relies on the same standard as *Harris*, that the transferee had “actual or constructive
 17 knowledge at the time that the transaction amounted to a breach or the legal equivalent of such
 18 knowledge.” *Id.* Plaintiff’s two theories—liability as transferee or as participant—create a
 19 distinction without difference. In either case, Plaintiff must demonstrate that Nevada Links had
 20 actual or constructive knowledge of the alleged breach. *Harris*, 530 U.S. at 251. Even when
 21 considered in the light most favorable to Plaintiff, the allegations fall far short of satisfying the
 22 standard applied under these cases.

23 **b. Plaintiff Has Not Established Through Its Pleading Or Its**
 24 **Improper Extrinsic Evidence That Nevada Links Had Actual Or**
 25 **Constructive Knowledge Of The County's Alleged Breach Of**
 Fiduciary Duty.

26 As Nevada Links previously explained, Plaintiff must surmount a high bar to plead a claim
 27 against Nevada Links as a transferee. Courts have not hesitated to dismiss claims at the pleading
 28 stage where “the most that can be said from the allegations is that the Corporate Defendants knew

1 that they got a good deal on [property] when doing business with the [fiduciaries].” *Begay v.*
 2 *Public Serv. Co. of N.M.*, 710 F. Supp. 2d 1161, 1209 (D.N.M. 2010). To successfully hold a
 3 transferee liable for the breach of the fiduciary, courts have required the plaintiff to demonstrate
 4 that the transferee acted with egregious disregard for the trust. *See Seminole Nation v. U.S.*, 316
 5 U.S. 286, 295-96 (1942) (third-party participant knew or should have known of a breach when the
 6 participant had reports that “show[ed] conclusively that the [fiduciaries] were notoriously and
 7 incurably corrupt, that every branch of the service was infested with favoritism, graft and
 8 crookedness, and that by such methods the [fiduciaries] acquired large fortunes” at the expense of
 9 the beneficiaries); *Donovan v. Schmoutey*, 592 F. Supp. 1361, 1398-99 (D. Nev. 1984) (borrowers
 10 liable as knowing participants when the borrowers knew, among other things, that (1) they were
 11 financially unstable, (2) they had applied prior loans for purposes unrelated to their businesses,
 12 (3) the securing collateral was insufficient to complete repayment, (4) they had provided material
 13 misrepresentations to the trustees, and (5) the assumptions on which the loan relied were
 14 materially incorrect). Plaintiff has not alleged that Nevada Links has committed any acts remotely
 15 analogous to the acts of the defendants in *Seminole Nation* or *Schmoutey*.

16 Instead, Plaintiff appears to argue that because Nevada Links knew that the County had not
 17 conducted an appraisal in the advance of the Fourth Amendment, Nevada Links must have been
 18 aware of a breach of fiduciary duty. Opp. at 12; Compl. at ¶ 62. As explained above, the County
 19 was under no obligation to conduct an appraisal. *See Murphy v. Central Bank & Tr. Co.*, 699 P.2d
 20 13, 14 (1985). The County’s only duty—assuming a trust was created—was to “exercise such
 21 care and skill as a man of ordinary prudence would exercise in dealing with his own property.”
 22 *Harris Tr. and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 251 (2000). The County
 23 did so and further conducted a public bidding process to obtain the best value the market would
 24 support. RJN, Ex. 1. The mere absence of an appraisal does not *prima facie* establish that the
 25 County breached its alleged duty or that Nevada Links had knowledge of the breach, and none of
 26 the relevant cases support Plaintiff’s position.

27 Plaintiff next argues that the differential between the 2013 appraisal and the Fourth
 28 Amendment’s monthly rent compels the inference that Nevada Links knew it was renting the

1 property for less than fair market value. Opp. at 12. In an effort to support this bald allegation,
 2 Plaintiff once again relies on an appraisal conducted in 2013, two years after Nevada Links and
 3 the County executed the Fourth Amendment in 2011. Opp. at 12; Compl. at ¶ 39. Again, Plaintiff
 4 does not and cannot allege that Nevada Links had knowledge of this appraisal at the time it
 5 entered into the Fourth Amendment because it occurred two years after the Fourth Amendment
 6 was negotiated and executed. *Id.*

7 In a last ditch effort to try to salvage its claim against Nevada Links, Plaintiff seeks judicial
 8 notice of video footage of the Clark County Board of Commissioners hearing from 2011 regarding
 9 approval of the Fourth Amendment, cherry picking statements made at the hearing to argue that
 10 Nevada Links knew that the Fourth Amendment would breach the County’s alleged duties to
 11 Plaintiff. *See* Plaintiff’s Request for Judicial Notice (ECF 26) (“RJN”). Plaintiff’s argument fails
 12 on multiple grounds. First, while it is correct that the Court may take judicial notice of matters of
 13 “public record”—which may include the fact that the hearing took place in 2011—it “may not take
 14 judicial notice of a fact that is ‘subject to reasonable dispute.’” *Lee v. City of Los Angeles*, 250
 15 F.3d 668, 689 (2001). Here, Plaintiff asks the Court to conclude, based on the proffered video
 16 footage, that “Nevada Links possessed actual knowledge of the County’s legal obligations to the
 17 United States and that the Fourth Amendment, if carried out, would violate those obligations.”
 18 Opposition at 13:1-4. In doing so, Plaintiff effectively seeks judicial notice of disputed facts,
 19 which is improper. *See Lee*, 250 F.3d at 689-690 (finding that district court improperly took
 20 judicial notice that a party waived extradition in a public document). Nevada Links disputes that it
 21 had knowledge (actual or constructive) that by entering into the Fourth Amendment the County
 22 breached any obligation to the United States. In fact, whether there even was such a breach is a
 23 fundamental disputed issue in this case. Thus, this is an improper request for judicial notice, and
 24 the Court should not consider the extrinsic evidence, other than to demonstrate the fact that the
 25 hearing took place in 2011. *See* Nevada Links’ Opposition To Request For Judicial Notice, filed
 26 herewith.

27 Even if the Court decides to consider the video testimony, however, a review of that
 28 testimony in its entirety (rather than just the cherry-picked excerpts discussed in Plaintiff’s papers)

1 undermines the County's position, as it does nothing to establish that Nevada Links had
 2 knowledge of the County's alleged breach of trust. As an initial matter, the testimony does not—
 3 contrary to Plaintiff's claims—contain an admission that the fair market rent under the Lease was
 4 “over \$2 million per year.” Instead, the testimony reveals that while an appraisal in 2010 valued
 5 the land at \$27 million, Nevada Links had to incur \$50 million in debt to develop the golf course
 6 on the land.¹ In addition, because the original Lease was a “profit participation” lease under which
 7 Nevada Links agreed to pay 40 percent of the net revenue to the County as rent, an economic
 8 analysis concluded that no rent was due to the County under that framework because there was no
 9 profit given the significant debt service that Nevada Links was required to pay on the property.²
 10 As a result, the County demanded that the rent be changed to a fixed, annual payment of \$100,000
 11 per year in lieu of the profit participation framework that had governed the lease since 1999, and
 12 the County further mandated that Nevada Links continue to be responsible for the entirety of the
 13 outstanding debt service on the property.³

14 All Plaintiff has demonstrated by way of the video is that the property subject to the Lease
 15 was so underwater that no rent could be collected under the original Lease terms. Against this
 16 contractual backdrop, the County and Nevada Links negotiated—based on a demand by the

17 ¹ Plaintiff's Request for Judicial Notice, Ex. B at 52:00-52:03 (“[Nevada Links] had been there
 18 twelve years. We were \$50,000,000 in debt.”) and 53:57-55:47 (“The other thing that we did is to
 19 determine the value of the fair market value of the real estate is we went and we hired again CB
 20 Richard Ellis to appraise the property for us. . . . This was the first appraisal that CB Richard Ellis
 21 did on the property and this was in September 1, 2010. The appraisal came in at \$27,600,000 at its
 22 highest value. We have \$50,000,000 in obligations there.).

23 ² Plaintiff's Request for Judicial Notice, Ex. B at 53:57-55:47 (“At the same time, we went and
 24 hired Restrepo Consulting who specializes in financial analysis. We asked them to take a look at
 25 the lease, to take a look at the facts and advise us on what the fair market rent was for the property.
 26 . . . Restrepo's conclusion was real simple. If the property appraised for \$27,600,000 and 10% is
 27 \$2,760,000 a year that would be the rent at 10%. Fifty million dollars worth of debt at 10%
 28 interest is \$5,000,000 a year. So the debt exceeded the rent payments substantially so their
 analysis was clearly there was no rent due.”). See also RJD at Ex. 1; Complaint ¶ 26.

³ Plaintiff's Request for Judicial Notice, Ex. B at 52:26-53:03 (“We had a discussion with
 Commissioner Sisolak who has initial responsibility for the area we are in and he said clearly – he
 can only speak for himself he could not speak for other commissioners, but his position was real
 simple – there would be some rent paid regardless of the appraisal and he insisted on a minimum
 of \$100,000 a year and also insisted that we take responsibility for 100% of the existing debt.”).

1 County—for a fixed rental value to provide income to the Plaintiff, the State of Nevada, and the
 2 County. Plaintiff has not demonstrated that Nevada Links had any reason to believe that the
 3 County had breached its duty under the Act. To the contrary, the testimony demonstrates that the
 4 County was zealously advocating to obtain larger rent payments from Nevada Links.

5 Like the corporate defendants in *Begay*, Nevada Links is “nothing more than a mere
 6 contracting party.” 710 F. Supp. 2d at 1210. This is not a case where the transferee willfully
 7 participated in the activities of a “notoriously and incurably corrupt” fiduciary, *Seminole Nation*,
 8 316 U.S. at 295- 96, or where the participant purposefully misrepresented their own finances and
 9 assumptions. *Donovan*, 592 F. Supp. at 1398-99. This case instead concerns a “mere contracting
 10 party” seeking “the best deal [it] legally can.” *Begay*, 710 F. Supp. 2d at 1210. In the absence of
 11 allegations establishing Nevada Links knew of a breach on the part of the County, Plaintiff’s
 12 claims must fail.

13 **C. Plaintiff’s Claim For Declaratory Relief Must Be Dismissed Because There Is**
 14 **No Actual Controversy.**

15 Because Plaintiff’s claim for breach of fiduciary duty fails against Nevada Links,
 16 Plaintiff’s claim for declaratory judgment as to Nevada Links also fails. *Harris County Texas v.*
 17 *MERSCORP Inc.*, 791 F.3d 545, 552 (5th Cir. 2015); *Earnest v. Lowentrift*, 690 F.2d 1198, 1203
 18 (5th Cir. 1982).

19 **III. CONCLUSION**

20 Plaintiff fails to plead facts sufficient to support the finding of a fiduciary duty between it
 21 and the County. Moreover, Plaintiff has not pled facts sufficient to support a theory that Nevada
 22 Links knew or should have known of an alleged breach of trust. Plaintiff’s Opposition does
 23 nothing to remedy these defects, and the 2011 public hearing testimony on which Plaintiff relies is

24 ///

25 ///

26 ///

27 ///

28 ///

1 not only an improper subject for judicial notice, it actually confirms that this motion should be
2 granted. For the foregoing reasons, the Court should dismiss Plaintiff's Complaint with prejudice
3 as to Nevada Links.

4 Dated: December 18, 2017

FARELLA BRAUN + MARTEL LLP

5 By: /s/ Anthony P. Schoenberg

6 Anthony P. Schoenberg

7 Attorneys for Nevada Links, Inc.

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28